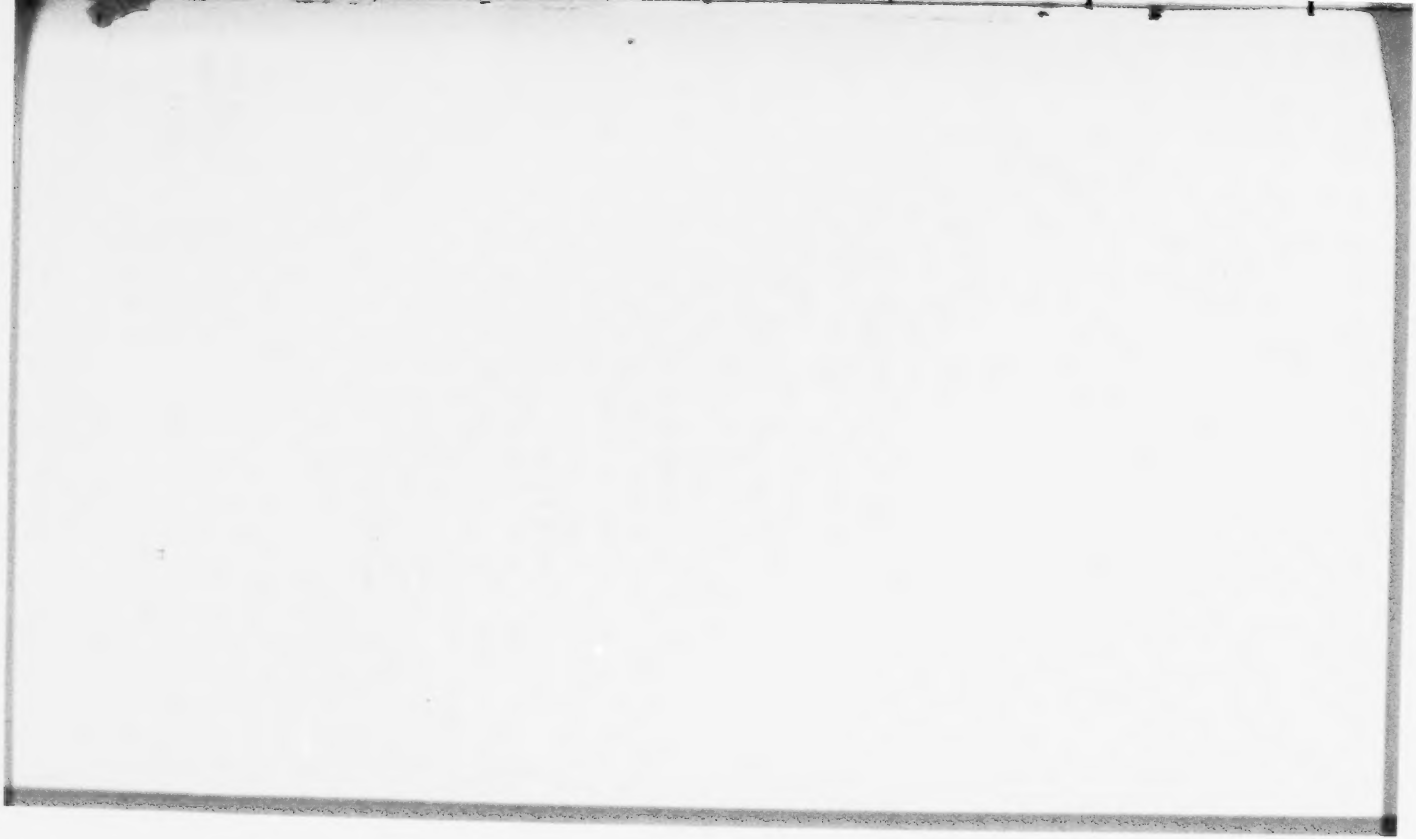

No. 39.

Brief of Mynderse for Appell

Filed April 1, 1896.

No. 39.

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SUPREME COURT OF THE UNITED STATES.

WILLIAM W. BRAUER, FREDERICK C. BRAUER and THE RELIANCE MARINE INSURANCE COMPANY (LIMITED),

Libellants,

against

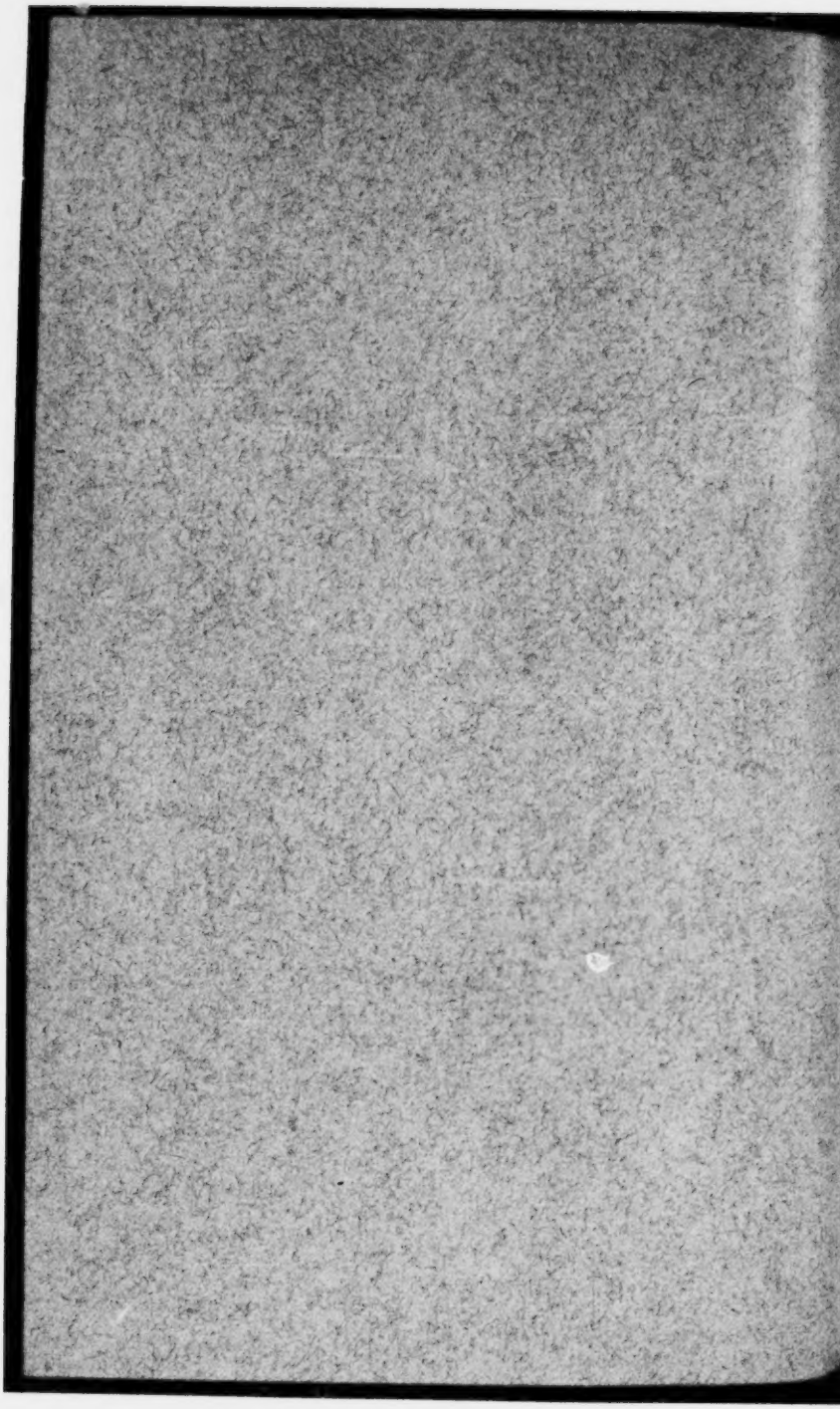
COMPANIA DE NAVIGACION LA FLECHA,

Respondent.

Brief in Support of Respondent's Petition for Writ of Certiorari.

BUTLER, STILLMAN & HUBBARD,

Proctors for Petitioner.



Supreme Court of the United States

WILLIAM W. BRAUER, FREDERICK C. BRAUER AND THE RELIANCE MARINE INSURANCE COMPANY, LIMITED,

Libellants,

against

COMPANIA DE NAVIGACION LA FLECHA,

Respondent.

Brief in Support of the Petition of Respondent for a Writ of Certiorari.

This action was originally instituted in the District Court of the United States for the Southern District of New York, by the libellants, as owners and insurers of a shipment of cattle, to recover from the respondent the alleged value of 126 head of cattle lost upon a voyage of the steamer *Hugo* from New York to Liverpool in November, 1891.

In October, 1891, the libellants, William W. Brauer and Frederick C. Brauer, composing the firm of W. W. Brauer & Company, shipped on board the respondent's steamer *Hugo*, at New York, 165 head of cattle, to be delivered at Liverpool.

The shipment had been provided for in a contract made between the agent of the *Hugo* and the libellants, W. W. Brauer & Company, October 10, 1891.

By the terms of this contract, the respondent let to the shippers

" space for the transportation of live cattle on the steamer *Hugo*,
" intended to sail from New York about October 24, 1891, for Liver-
" pool, England, for about 160 live cattle on the upper deck * * *
" at the rate of fifty shillings British sterling for each animal shipped
" on open decks " *(Exh. 2, Record, fols. 690 ,691).*

The shipper agreed to prepay freight on the number of cattle shipped at New York,

" vessel lost or not lost, and irrespective of the number landed at " the port of destination, and the shipper assumed all risk of mor- " tality or accident, however caused, throughout the voyage " *(Exh. 2, Record, fol. 691).*

Stalls were to be erected at the steamer's expense, and the steamer undertook to supply water for the use of the animals, space for their fodder, suitable gangways for loading the cattle, and free passage over and back to the drovers in charge of the animals *(Exh. 2, Record, fols. 692, 693).*

It was further provided in the agreement ;

" The line form of live stock bill of lading to be used for cattle " to be shipped under this contract, and its conditions to govern any " questions not provided herein, subject to United States Govern- " ment inspection " *(Exh. 2, Record, fol. 696).*

Under this agreement the libellants W. W. Brauer & Company shipped on board the *Hugo* at New York, October 24, 1891, 165 head of cattle, and, in accordance with the terms of the agreement, received a bill of lading, the material portions of which were as follows:

" Received in apparent good order and condition by the Spanish " steamer *Hugo*, from Wm. W. Brauer & Co , to be transported by " the good ship *Hugo*, now lying in the port of New York, and " bound for Liverpool, one hundred and sixty-five live cattle on deck.

" On deck at owners' risk ; steamer not to be held accountable " for accident to or mortality of the animals from whatever cause " arising. * * *

" It is mutually agreed that the carrier shall not be liable for " loss or damage occasioned by causes beyond his control, by the " perils of the sea, or other waters ; * * * by barratry of " the master or crew ; * * * by collisions, stranding or " other accidents of navigation of whatsoever kind (even when " occasioned by the negligence, default or error in judgment of " the pilot, master, mariners or other servants of the ship owner, " not resulting, however, in any case, from want of due diligence by " the owners of the ship, or any of them, or by the ship's husband or " manager). * * *

" Also that, in the event of claims for short delivery when the " ship reaches her destination, the price shall be the market price " at the port of destination on the day of the ship's entry at the " Custom House, less all charges saved. * * *

"Also that this contract shall be governed by British law, with "reference to which law this contract is made.

"And, finally, in accepting this bill of lading, the shipper, owner "and consignee of the goods, and the holder of the bill of lading, "agree to be bound by all of its stipulations, exceptions and condi- "tions, whether written or printed, as fully as if they were all signed "by such shipper, owner, consignee or holder."

Exh. A, Record, fols. 709-716.

The libel was based upon the bill of lading *(Libel, Record, fol. 7)*, and upon an allegation that

"On or about October 31, 1891, the said vessel, having en- "countered some rough weather, the master and crew of said vessel "became panic-stricken and drove overboard 126 head of cattle. "The said vessel did not incur any extraordinary or unusual stress "of weather, and the act of said master and crew in driving over- "board said cattle was wholly unnecessary, and the loss of said "cattle is due to the incompetency and lack of skill of the master "and crew" *(Libel, Record, fol. 8)*.

The libel further alleged that the libellants, the Reliance Marine Insurance Company, Limited, of Liverpool, had made insurance upon the cattle for W. W. Brauer & Co. against perils of the sea, jettisons, barratry of the master and mariners, and had paid the insurance on the 126 head of cattle lost *(Libel, Record, fols. 10, 11)*.

The answer filed by the respondent denied the allegations of the libel respecting the circumstances under which the cattle were lost, and averred that

"The loss of said cattle was due to the perils of the seas encoun- "tered upon the said voyage, which broke several of the cattle "houses and set the cattle adrift, and that during the continuance "of the perils, and by reason thereof, certain of the cattle were "washed overboard and others were thrown about the deck, bruised "and with broken limbs, and reduced to a dead, dying or hopeless "condition, and that upon such being taken to the gangways they "were washed over by the seas, which were at the time so raging "that one of the seamen of the steamer was washed from the deck "into the sea" *(Answer, Record, fol. 26)*.

The answer further averred that:

"The care given to said cattle was according to the best judg- "ment of the master of said steamer, and that if he erred in his "judgment or was in any degree negligent, which the respondent "denies, that still this respondent is absolved from accountability "and responsibility by reason of the terms of the bill of lading;

" and, also, that by the law as administered in the Courts of Great " Britain, the respondent, being itself without fault, is validly, under " the terms of the said contract and bill of lading, absolved from all " responsibility for any negligent or improper act or conduct on the " part of the master, mariners or other servants of the respondent " *(Answer, Record, fols. 27, 28).*

The answer specifically claimed the benefits of the exemptions of the bill of lading, and the benefits of the British law by an averment of the provision :

" That the contract should be construed and governed by the " law as administered in the Courts of Great Britain, with reference " to which law the contract was stated to be made and was made " *(Answer, Record, fol. 25).*

The *Hugo* was an iron steamer, of highest class, and in good condition. Her length was 375 feet; her beam, 36 feet, and her depth of hold about 30 feet. She was under the command of an experienced master.

On the 30th of October the vessel met a storm, which continued until November 2d. During the continuance of the storm the steamer lay hove-to for thirty-six hours. When the storm was over 126 cattle had been lost.

The proofs upon the trial were in serious conflict. The libellants presented proofs to show that the master was negligent in the navigation of his vessel, and that the loss of the cattle was due to that cause. They also presented proofs to show that the cattle had been driven overboard under the orders of the master of the steamer.

The respondent presented proofs to sustain the allegations of its answer.

The log of the steamer showed that in the afternoon of October 30th a heavy storm was encountered, as a result of which 126 of the beasts perished, being killed or fatally maimed by the perils encountered, or swept overboard by the seas when the gangways were opened to clear the decks of the dead cattle. The log is printed at folios 717–730 of the record.

It was provided by stipulation that the English judicial decisions, as contained in the printed reports of the Law or Admiralty Courts, might be referred to by either party as evidence of the English common or maritime law as administered in the English Courts *(Stipulation, Record, fol. 678).*

The District Court held that, by the perils encountered, some of the cattle were fatally wounded or maimed and that others were cast overboard, or negligently suffered to go overboard, without any effort being made to separate the sound from the maimed *(Opinion, Record, fol. 803)*.

Held that the exemptions of the bill of lading, which provided that the cattle should be at owners' risk, and that the steamer should not be held accountable for accident to or mortality of the animals, or for any accidents of navigation, even when occasioned by the negligence, default or error in judgment of the master, were invalid as against the public policy of this country, and that the further stipulation substituting the British law for the law of the United States was likewise invalid *(Opinion, Record, fols. 806, 807)*.

A decree was accordingly made in favor of the libellants for such of the cattle voluntarily sacrificed as were either in sound condition or not fatally wounded or maimed at the time they were cast overboard, or negligently or designedly suffered to go overboard through the open gangways on the morning of Nobember 1st, and on the evening of the night previous *(Opinion, Record, fol. 806)*.

The Commissioner, to whom reference was had to assess damages, reported :

"I am satisfied that much the greater portion of the 126 cattle
" were set loose by the storm and thrown and rolled about the deck
" during Saturday night and Sunday, and that at least half of all
" that were lost were either dead or fatally wounded or maimed and
" in a hopeless condition when they were carried overboard. * * *
" My conclusion from the whole evidence is in favor of the probabil-
" ity that the proportions between the dead and the fatally wounded,
" on the one hand, and those that were alive and not fatally maimed
" or wounded, on the other, are about equal " *(Report, Record, fols. 936, 937)*.

and he accordingly reported against the respondent for the loss of 63 cattle.

The report of the Commissioner was confirmed by the District Court as to the number of cattle for which the steamer was held liable, and a decree was accordingly entered *(Opinion and Decree, Record, fols. 967, 971-973)*.

Both parties appealed to the United States Circuit Court of Appeals for the Second Judicial Circuit, and on March 5, 1894, a

decision was filed by a majority of the Court holding that the decree of the District Court should be affirmed.

The majority of the Court state :

"The reason for throwing both sound and maimed cattle over-
" board was a great dissatisfaction with the existing state of the
" decks, an apprehension that the state of things would continue,
" and a determination to put an end to trouble from cattle."
Opinion, Record, fol. 1033.

The majority further held in regard to the 63 cattle for which the steamer was held liable that they were lost through an entire clearance of the decks without apparent necessity and without an effort to discriminate or save any, and that there was no pretense that it was to save the ship or the cargo, or that it was necessary to sacrifice the animals for the benefit of the survivors *(Opinion, Record, fols. 1039, 1040).*

The majority of the Court also held that the English authorities cited to establish the British law did not control the case *(Opinion, Record, fols. 1039, 1044).*

Judge WALLACE dissented from the opinion held by the majority, and said :

" I agree with the Commissioner when he says ' I do not doubt
" ' the entire good faith of the master, and that he would gladly
" ' have saved the other cattle, as well as the thirty-nine that re-
" ' mained on board.' * * * I think a prudent regard for the
" safety of the ship and crew, in view of the situation as it was at
" the time, justified him in clearing the deck of the mass of dead
" and wounded cattle, and that it is idle to say that there was any
" practicable opportunity upon that storm-swept deck to separate
" the dead cattle from the wounded and dangerous live ones. After
" the event, and with the wisdom which comes from retrospect, it
" is not difficult to conjecture in case of disaster what might have
" been done that was not done ; but I am satisfied from the proofs
" that the master did everything which a prudent and honest navi-
" gator would have done under the circumstances from the time he
" hove-to his vessel until the hurricane was over, and that the loss
" of the cattle was caused by perils of the sea, and therefore within
" one of the accepted risks of the bill of lading." *(Opinion, Record, fols. 1049–1051).*

The majority further held that while the injury to and drowning of the maimed animals were caused by perils of the sea, the non-delivery of the sound cattle was not caused by perils of the sea or

by accidents of navigation, or by circumstances properly incident to navigation *(Opinion, Record, fols. 1042, 1043)*.

The Court thereupon ordered that the decree appealed from be affirmed, and that a mandate issue accordingly *(Order, Record, fols. 1055, 1056)*.

For the reasons set forth in the petition the respondent prays for a writ of *certiorari* to the United States Circuit Court of Appeals for the Second Judicial Circuit, commanding that it certify and return to this Court all of the proceedings by them had in the action *(Petition, Art. 17, pp. 11, 12)*.

POINTS.

First.

THE LAW OF GREAT BRITAIN SHOULD BE APPLIED TO THE CONSTRUCTION OF THE CONTRACT AS SET FORTH IN THE BILL OF LADING, AND THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN OMITTING TO APPLY SUCH LAW TO THE CONSTRUCTION OF THE AGREEMENT.

In the bill of lading the following provisions are found:

"This contract shall be governed by the British law, with refer-
"ence to which law this contract is made.

"Finally, in accepting this bill of lading, the shipper, owner and
"consignee of the goods, and the owner of the bill of lading, agree
"to be bound by all its stipulations, exceptions and conditions,
"whether written or printed, as fully as if they were all signed by
"such shipper, owner, consignee or holder" *(Exhibit A, Record, fols. 713–716)*.

On October 10, 1891, two weeks before the bill of lading was issued, a contract had been made for the shipment of cattle. That contract provided that this very bill of lading should be used *(Exhibit 2, Record, fol. 696)*, and specifically provided that the shipper assumed all risk of mortality or accident, however caused, throughout the voyage *(Exhibit 2, Record, fol. 691)*.

In the very recent case of *Henderson vs. Goldsmith*, in which an

opinion was rendered by this Court at the present term, it was held that a similar preliminary contract was a mere memorandum between the parties, and that the relations of the parties were to be governed by the provisions of the bill of lading.

Goldsmith vs. Henderson, Calendar U. S. Supreme Court, 1894, No. 107.

In the case now under consideration there can be no question but that the bill of lading is the controlling contract for the reason that the preliminary contract provided in terms for this form of bill of lading, and the bill of lading was subsequently accepted by the shipper as being strictly in line with the preliminary contract. So far from being objected to or protested against in any way by the libellants, they founded their libel upon it *(Libel, Art. 1, Record, fol. 7).*

It is fair to say, therefore, that the parties deliberately chose to submit the question of responsibility under the contract to the law of Great Britain.

In the case of the *Montana* this Court held:

"The general rule that the nature, the obligation and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country.

"There does not appear to us to be anything in either of the bills of lading in the present case tending to show that the contracting parties looked to the law of England, or to any other law than that of the place where the contract was made."

Liv. & G. W. Steam Co. vs. Phenix Ins. Co., 129 U. S., 397, 458.

This Court held in that case that there was nothing to indicate that the contracting parties looked to any other law than the law of the United States.

In the case under consideration, however, it is apparent that the parties *did* look to the law of England; that they deliberately chose it; that it was not the exaction from a shipper by a carrier, but that it was in accord with a preliminary contract, freely made and unobjected to.

The cattle were destined to an English port. It was fitting that reference should be made to the law of that port. Any differences between shippers and ship-owner would naturally be submitted to the law of the place where their relations terminated.

Moreover, the Reliance Marine Insurance Company (Limited), which represents the entire interest of the libellants *(Libel, Record, fols. 5, 10, 11; Assignment Exh. 1, Record, fol. 682)*, is a British corporation having its principal office in Liverpool, the port of the *Hugo's* destination.

Proof of the English law was made under a stipulation, which provided:

"It is hereby stipulated that the English judicial decisions, as "contained in the printed reports of the Law or Admiralty Courts, "may be referred to by either party as evidence of the English "common or maritime law as administered in the English Courts" *(Stipulation, Record, fol. 678)*.

The following cases were cited by the petitioner in the District Court and in the United States Circuit Court of Appeals:

The Duero, L. R., 2 Ad. & Ecc., 393 (1869).
Grill vs. General Iron & Screw Collier Co., L. R., 1 C. P., 600 (1866).
The Cressington, L. R., 1 Prob., 152 (1891).
Burton vs. English, L. R., 12 Q. B. Div., 218 (1883) (Record, fol. 247).

The application of these cases respectively to the several exemption clauses of the bill of lading will be hereafter considered.

The District Judge declined to enforce the English law, upon the ground that the stipulation in the bill of lading providing for the application of the British law was invalid as against the public policy of the United States *(Record, Opinion, fol. 806)*.

A similar provision had, however, been sustained in the District Court of Maryland.

The Oranmore, 24 Fed. Rep., 922.

The United States Circuit Court of Appeals avoided any discussion of the application of the British law, disregarding certain of the exemption clauses, and holding in respect to others that the facts did not render the question of applying the British law material *(Opinion, Record, fols. 1038, 1039, 1044)*.

The case of *Oscanyan vs. Arms Co., 103 U. S., 261,* which has been cited in opposition, is not pertinent, for the reason that the suit was founded on a *turpis causa*, arising and performed wholly within the United States; nor is the case of *Rousillon vs. Rousillon, L. R. 14, Chan. Div., 351,* for the reason that the contract there sued upon was in fact enforced, though Justice FRY did say *obiter* that, if a contract valid in France was made in France *to be performed in England*, the English courts would not enforce it if it was against the morals or public policy of England *(pp. 357, 369)*.

Second.

THE PROVISIONS IN THE BILL OF LADING THAT THE CONTRACT BE GOVERNED BY BRITISH LAW, IS NOT INVALID.

It cannot be fairly said that there is a question in the case whether or not it is against the public policy of this country to permit a carrier by sea to exempt himself from the consequences of his servants' negligence or error. The real question is whether it is against the public policy of this country to permit ship owner and shipper to agree in New York that their contract for a shipment of cattle from New York to England shall be construed according to the place where the final performance of the contract takes place and where, if anywhere, differences as to the performance by the carrier of his engagements would naturally arise.

It is especially proper that, where a contract relates to transportation on the high seas from one nation to another, the entire transaction not being under the jurisdiction of any one nation, the parties shall declare in their contract the jurisdiction by the laws of which they intend their contract to be governed.

With such declaration made, it is against public policy and against commercial integrity to permit either party, and especially the party with whom the right to select the forum rests, to insist that the law of the forum, and not the law stipulated in the contract, should be applied to the construction of the contract.

It has been said by this Court that it is against public policy to

permit a carrier to exempt himself from the consequences of the negligence of his servants.

Railroad Company vs. Lockwood, 17 Wallace (U. S.), 357, 368.

The rule has been extended from the strict obligations resting upon a carrier by land, to cover those of a carrier by sea.

Liv. & G. W. Steam Co. vs. Phenix Ins. Co., 129 U. S., 397.

At the time this latter decision was made there was no legislative distinction between the obligations and rights of a carrier by sea and of a carrier by land.

Nor, indeed, was there any such distinction at the time these cattle were shipped upon the *Hugo*. But Congress, with whom certainly rests the right to declare the public policy of a country, have since that date passed an act which provides in terms that:

" If the owner of any vessel transporting merchandise or prop-
" erty to or from any port in the United States of America, shall
" exercise due diligence to make the said vessel in all respects sea-
" worthy and properly manned, equipped and supplied, neither the
" vessel, or owner, or owner's agent or charterers, shall become or
" be held responsible for damage or loss resulting from faults or
" errors of navigation, or in the management of said vessel " *(Sec. 3, Ch. 105, Laws of 1893).*

The act contains another significant feature.

By Section 1 of the act it is provided that it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of the vessel did exercise due diligence to properly equip the vessel, and to make her seaworthy, and whereby the obligations of the master, officers or servants to carefully handle and stow the cargo, and to care for and deliver it, shall in anywise be lessened, weakened or avoided.

Section VII., however, specifically provides that the provisions of Section I. shall not apply to the transportation of live animals.

This indicates, not only a recognition by Congress, that the carrier by sea shall not be held to the strict accountability of a carrier by land, but, further, that the carrier of live animals by sea should be permitted, in distinction from carriers of other merchandise, to insert provisions in the bill of lading specifically exempting him from responsibility for the acts of master, officers or servants.

Third.

IF THE CONTRACT OF SHIPMENT IS GOVERNED BY THE BRITISH LAW, NO LIABILITY RESTS UPON THE SHIPOWNER FOR THE LOSS OF LIBELLANTS' CATTLE, EVEN UPON THE FACTS FOUND BY A MAJORITY OF THE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS.

A majority of the Judges of the United States Circuit Court of Appeals found, as facts, that :

" The injury to and drowning of the maimed animals were caused " by the perils of the sea, but that the non-delivery of the sound " cattle was not caused by a peril of the sea or the accidents of nav- " igation or circumstances properly incident to navigation " *(Opinion, Record, fols. 1042, 1043).*

The majority further held, as a matter " undoubtedly true," that the fatally-injured cattle were " properly thrown overboard " *(Opinion, Record, fol. 1035).*

The majority further held that it was apparent

" that the master determined to rid the ship of every head of cattle " except those under the turtleback. He intended to clear the decks " of cattle whether well or injured, and no effort was made ' to sepa- " ' rate the sound from the maimed.' The cattle not injured were " pushed or prodded and driven across the slippery iron deck, and " were hurried over the gangways as rapidly as possible, and in a " short space of time. ' No attempt was made to discriminate or to " ' save any,' because the master and the crew wanted none saved. " We concur with the District Judge in the conclusion that there " was ' no reasonable or apparent necessity ' for the non-existence " of an attempt to separate the two classes " *(Opinion, Record, fols. 1031, 1032).*

The majority further held that :

" The sacrifice was not to save the vessel or her cargo, but the " presence of the cattle during the storm was a great inconvenience, " and there was, as found by the District Judge, an apprehension " that the storm would continue, and that the existing inconvenience " would be increased. The reason for throwing both sound and " maimed cattle overboard was a great dissatisfaction with the " existing state of the decks, an apprehension that the same state of " things would continue, and a determination to put an end to " trouble from cattle " *(Opinion, Record, fols. 1032, 1033).*

The finding of the Commissioner that the cattlemen showed no disposition to try to save any of the cattle, or to seek to have them saved *(Opinion, Record, fols. 895, 896)*, is not referred to by the majority of the Court, nor is there any reference to the argument of the respondent that the loss of those cattle that were not fatally wounded was a necessary incident to clearing the deck of the wrecked and maimed cattle, and ought not to be ascribed to either negligence or design on the part of the master *(Record, fol. 907)*.

Taking the facts just as they are stated by the majority of the Court, the worst case that is established is one of unjustifiable jettison by the master, either through panic or unfounded apprehension.

There are several exemption clauses to be considered.

A It was recited in the bill of lading that the cattle were shipped " on deck at owners' risk " *Exhibit A Record, fols. 709-712.)*

That such a provision should be made respecting a shipment of live animals to be transported on the deck of a freight steamer across the Atlantic, at a tempestuous season of the year, was eminently proper, and due compensation for the risks assumed by the owner of the cattle was undoubtedly given in the rate of freight at which the cattle were accepted for carriage.

In the case of *Burton vs. English*, a similar clause " The steamer " shall be provided with a deck cargo, if required at full freight, but " at merchant's risk " was considered by the Judges of the Queen's Bench Division, who substantially held that it relieved the ship owner from all responsibility for the acts of his servants, except responsibility to contribute in general average in case of lawful jettison or other lawful sacrifice.

Justice BRETT said :

" It is obvious that this is a stipulation in favor of the shipown-
" ers, for, in order to earn a larger freight, they may require part of
" the cargo to be deck cargo, and then it is to be at the merchant's
" risk. My brother CAVE, who delivered the judgment of the
" Divisional Court, held that this stipulation absolved the shipown-
" ers from liability to contribute to general average. It must be
" admitted that if there were an *improper jettison* by the master and
" crew, this stipulation would relieve the shipowners from liability.
" * * * If the liability is in consequence of any act of any of his
" servants for which the shipowner would be liable but for this
" stipulation, then it follows that the defendants are freed from

" liability. I should say that this stipulation would cover any act " of the master or crew, which being done by them as servants of " the shipowner would otherwise make him liable; *it therefore covers* " *the case of improper jettison, also a loss caused by a collision or* " *stranding owing to the negligence of the master or crew.*"

Burton vs. English, L. R., 12 Q. B. Div., pp. 218, 219, 220.

Justice BOWEN said, respecting the clause:

" Now, that clearly is a stipulation in favor of the shipowners, " and *prima facie* it seems to me meant to relieve them from the " responsibility of some act of their servants by which they would " otherwise be bound, and from the incidents of some risk which " otherwise would fall upon them as carriers and under their con- " tract of carriage. *It would, I think, clearly cover im-* " *proper jettison, also it would cover negligence of the cap-* " *tain or crew, occasioning stranding or colliison, and any* " *other acts, if any there be, of the servants of the shipowners for* " *which they would otherwise be responsible.*"

Burton vs. English, L. R., 12 Q. B. Div. 218, 223.

Justice BAGGALLAY concurred in the view of Justices BRETT and BOWEN.

See, also,

Lewis vs. The Great Western Ry. Co., L. R., 32, B. Div., 195.

McCauley vs. Furness Ry. Co., L. R., 82, B. 57.

If sixty-three sound cattle went overboard from the *Hugo*, and their loss is to be attributed to unjustifiable or improper jettison, then, under a proper application of the clause "on deck at owner's risk," as construed under the British law, the shipowner is exempt from liability.

The clause referred to was not considered at all by the Judges of the United States Circuit Court of Appeals.

If the libellants have any claim for contribution in general average because of the jettison of their cattle, that claim will have to be presented in another tribunal and be adjudged upon its merits. They cannot recover upon a charge of negligence.

B. A further clause of exemption is contained in the words:

" Steamer not to be held accountable for accident to or mortality " of the animals, from whatever cause arising" *(Exhibit A, fols. 709-712).*

The only question under this exemption, is whether the loss of the cattle was either an "accident" or "mortality" If it was, the clause gives valid exemption to the ship owner.

We submit that inasmuch as much the greater portion of the animals lost were wrecked and maimed by perils of the seas, and as the gangways were properly opened to permit the dead and wounded beasts to be swept into the sea, the loss of the others, even if sound, was a necessary incident to clearing the deck, and is in that sense to be deemed "accidental."

C. A further exemption is found in the words:

"It is also mutually agreed that the carrier shall not be liable "for loss or damage occasioned by causes beyond his control, by the "perils of the sea, or other waters * * * by barratry of the "master or crew * * * by collisions, stranding, or other acci- "dents of navigation, of whatsoever kind (even when occasioned by "the negligence, default or error in judgment of the pilot, master, "mariners or other servants of the ship owner"), etc., etc. *(Exhibit A, Record, fols. 709-712).*

(**a**) No consideration was given by the Judges of the United States Circuit Court of Appeals to the exemption for loss or damage "occasioned by causes beyond his (the shipowner's) control."

The shipowner provided a seaworthy vessel and manned her with a sufficient crew, and placed her under the command of an experienced master, so that, when she started upon her voyage, she was in every way fitted therefor.

That the master should become unreasonably panicstricken, if such was the fact, or that he should, in spite of his qualifications and experience, err in judgment at a critical time when he was more than a thousand miles from the coast, beyond the advice or the authority of the shipowner was a matter entirely "beyond the control" of the shipowner and, by this clause of the bill of lading, when supplemented specifically by the negligence clause, the shipowner is discharged from liability.

That such an exemption is reasonable is now recognized by our own statutes.

U. S. Statutes, 1893, Chap. 105, § 3.

(**b**) The opinion filed by a majority of the judges of the United States Circuit Court of Appeals, says:

" The master's unfounded but existing apprehension in regard " to the future relieves his conduct from the charge of barratry. " There was a destruction of property, but the Court says it was " not so much tainted with dishonest views or fraudulent breach " of trust as to come within the definition of barratrous conduct " " *(Opinion, Record, fol.* 1043*).*

If the master did, in fact, drive cattle overboard not for personal pecuniary profit, but for personal comfort and gratification *(Opinion, Record, fols. 1041, 1042)*, his conduct was barratrous, and the shipowners are relieved from responsibility by the exemption.

Barratry in a contract of carriage bears a different meaning than does the same word in a contract of insurance.

Carver's Carriage by Sea, 2d Edition, §§ 99, 100, pp. 107, 108, 109.

" Barratry means any willful act of spoliation or violence to the " ship or goods, or any fraudulent or consciously illegal act which " exposes the ship or goods to danger of damage, destruction or " confiscation, done by the master or crew without the consent of " the shipowner.

" For example, if goods are lost or damaged by the master " wilfully running the ship upon rocks or attempting to scuttle her ; " or through a fraudulent delay or deviation upon the voyage for " the master's private purposes ; or by the ship and cargo being " fraudulently sold by the master, the exception relieves the ship- " owner from responsibility for such losses. So, again, if the goods " become confiscated owing to the master using the ship for pur- " poses of smuggling, or trading with an enemy, or running a blockade. " *And the effect is the same, although the master was intending to act* " *for the benefit of the owners.*"

Carver's Carriage by Sea, 2d Edition, § 99, pp. 107, 108.

(**c.**) If the immediate cause of loss is to be deemed an accident of navigation, the shipowner is freed from liability, even though such accident was remotely due to the negligence, default or error in judgment of the pilot, master or mariners of the ship.

Carver's Carriage by Sea, 2d Ed., § 101, p. 110.
The Duero, L. R., 2 Ad. & Ecc., 393.
Grill vs. General Iron Screw Collier Co., L. R., 1 C. P., 600.
The Cressington, L. R., 1 Prob., 152 (1891).

Fourth.

IT IS A MATTER OF GREAT PUBLIC INTEREST THAT THIS COURT SHOULD DECLARE THE EFFECT OF A CLAUSE WHICH PROVIDES THAT THE BILL OF LADING SHALL BE GOVERNED BY A LAW OTHER THAN THE LAW OF THE PLACE OF ISSUE.

The question has arisen in numerous cases, but there is as yet no authoritative decision of any appellate tribunal.

The clause has been sustained as valid in the District Court of the United States for the District of Maryland.

The Oranmore, 24 Fed. Rep., 922.

It has been rejected as invalid in the District Court of the United States for the Southern District of New York, and in the District Court of the United States for the District of Massachusetts.

The Brantford City, 29 Fed. Rep., 373, 396.
The Guildhall, 58 Fed. Rep., 796.
The Iowa, 50 Fed. Rep., 561.

No appellate tribunal has passed upon the validity of the clause, and no certainty can be felt by the enormous commercial and shipping interests using bills of lading until the question has been adjudicated in this Court.

No question has ever been raised in either pleadings or proofs as to the regularity of the clause in the bill of lading.

It was there properly, in accordance with the terms of the original memorandum contract, and, though it was fully pleaded by the respondent, there has been no suggestion by the libellants of irregularity or surprise.

Fifth.

A WRIT OF CERTIORARI SHOULD BE GRANTED, DIRECTED TO THE HONORABLE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND JUDICIAL CIRCUIT, COMMANDING THEM FORTHWITH TO CERTIFY AND RETURN TO THIS COURT ALL OF THE PROCEEDINGS BY THEM HAD IN THIS ACTION.

BUTLER, STILLMAN & HUBBARD,
Proctors for Petitioner.

WILHELMUS MYNDERSE,
Advocate.